

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

FRATERNAL ORDER OF POLICE, LODGE #5
Union,

-- and --

OPINION & AWARD
AAA No. 01-18-0001-1579
Detective Jon Demnisky
Suspension Grievance

CITY OF PHILADELPHIA
Employer.

ARBITRATOR: Robert H. Barron, Esq.

APPEARANCES: For the Union:
Ralph J. Teti, Esq
Willig, Williams & Davidson

For the Employer:
Benjamin Patchen, Esq.
Assistant City Solicitor

This dispute arose January 16, 2018 when the City of Philadelphia ("the City") suspended Detective Jon Demnisky (the "Grievant") for thirty days. On January 23, 2018 Philadelphia Lodge #5, Fraternal Order of Police ("the Union") filed a grievance challenging the suspension on the ground that it was without just cause.

By letter dated April 11, 2018, from the American Arbitration Association (AAA), the undersigned was notified of his selection as Arbitrator of the instant dispute. Hearings were held in Philadelphia, Pennsylvania on September 13, 2018, where the

parties were afforded a full opportunity to present testimony, exhibits and arguments in support of their respective positions. There was no transcript. The parties presented closing arguments in lieu of submitting post-hearing briefs, and the record was closed. After fully considering all the evidence and arguments presented, the matter is now ready for final disposition.

QUESTIONS TO BE RESOLVED

At the hearing, the parties stipulated to the following issue for arbitral determination:

Did the City have just cause to suspend Grievant for thirty days, and if not, what shall be the remedy.

APPLICABLE CONTRACT PROVISIONS

SECTION XX DISCIPLINE AND DISCHARGE

J.1.

The Disciplinary Code (attachment (M)) shall be effective immediately for all infractions that are charged by the Department on or after the date that this Award is issued, regardless of when the underlying conduct occurred.

CODE OF DISCIPLINE

Introduction

...The core values of the Philadelphia Police Department are:

Honor - ...Do nothing that will tarnish your badge, for one day you will pass it to another Philadelphia Police officer to honor and respect.

Service - ...We are in the business of providing Police service with the highest degree of professionalism....

Integrity – Integrity is the bedrock of policing and the foundation for building a successful relationship with our partners. Integrity means reflecting our values through our actions. It is not enough to espouse honor, service and integrity. Each of us must live these values in our professional and personal lives. We do this by being honest in our dealings and abiding by the laws and respecting the civil rights of all. Serving with integrity builds trust between the community and the Police.

Members of the Philadelphia Police Department must be morally and ethically above reproach at all times regardless of duty status. All members shall respect the sanctity of the law and shall be committed to holding themselves to the highest

standards of accountability. No member shall depart from standards of professional conduct or disobey the law.

Article I – CONDUCT UNBECOMING

1-§009-10 – Lying or attempting to deceive regarding a material fact during the course of any Departmental investigation.

1st Offense – 10 days to Dismissal

1-§021-10 – Any incident, conduct or course of conduct which indicates that an employee has little or no regard for his/her responsibility as a member of the Police Department.

1st Offense – 30 days or Dismissal.

Article VI – DISOBEDIENCE

6-§009-10 – Improper or unauthorized use of Departmentally owned or leased equipment.

1st offense – Reprimand to 5 days.

FACTUAL BACKGROUND

Grievant has been employed by the City since 1995. He began his career as a corrections officer and in 2001 became a Police officer with the Philadelphia Police Department (“the Department”) where he served in a variety of capacities. In 2007 he became a Detective, the position he currently holds. As a Police officer Grievant has received numerous citations and official commendations, and he currently has two pending commendations.

The Department’s resources include access to data bases that allow officers to obtain various types of information. These data bases are only to be used for Police business. One of those data bases allows officers to search license plates and identifies the name and address of the individual registered for the license plate.

Another data base is the CLEAR data base, which is a third-party law enforcement system to which the Department subscribes. CLEAR allows officers to enter an address and identifies the occupants of the address along with their date of birth and phone number. Officers with access to CLEAR sign a Statement of Liability form that states the

CLEAR system can only be used for official law enforcement purposes, that the system may not be used for personal purposes, and that violation of the system's security, confidentiality or dissemination rules may subject the violator to administrative action. Grievant signed Statement of Liability forms in 2003, 2005, 2007, 2009, 2011, 2014 and January 25, 2016. (City Ex. 1 at 248-54)

At the time of the incident Grievant was working as a Detective assigned to the Recruit Background Investigation Unit and was supervised by Sergeant S [REDACTED] C [REDACTED] ('C [REDACTED]'). In that role Grievant performed background investigations of Police officer applicants.

On July 31, 2017, Grievant's day off, he was leaving Wildwood with Officer M [REDACTED] A [REDACTED] ('A [REDACTED]') and her daughter. A [REDACTED] also worked in the Recruit Background Investigation Unit and was on her day off. A [REDACTED] was driving a red Jeep Liberty and Grievant was sitting in the passenger seat. While driving out of Wildwood A [REDACTED] and Grievant were involved in an altercation with a man driving a silver Audi who had a woman in the passenger seat.¹

The general details of the altercation are not in dispute, and the cause and specific details of the altercation are not germane to this decision. While still in Wildwood the driver of the Audi drove erratically and Grievant felt Driver was attempting to cause A [REDACTED] to have an accident. At a traffic light Driver began to get out of the Audi and Grievant told him that if he got out of the car Driver would need a dentist. Driver did not get out of the Audi. The Audi pulled to the side of the road and A [REDACTED] drove away. Shortly thereafter the Audi sped to catch up to A [REDACTED]'s car on the Garden State Parkway and again drove in a

¹ The driver of the Audi will be referred to as "Driver" and the passenger of the Audi will be referred to as "Passenger".

manner that Grievant felt was trying to cause A [REDACTED] to get in an accident. Grievant called 911 and reported the Audi's dangerous driving to the State Police, but Grievant did not observe the Audi being pulled over. The two cars then separated without further incident. During the altercation Grievant and A [REDACTED] did not identify themselves as Police officers and did not take any picture of the Audi or its license plate.

The City presented the testimony of four witnesses. Detective Timothy Thompson, the Internal Affairs officer who investigated Grievant's actions, A [REDACTED], Thomas Miles, a Police officer for Manheim township, and Captain Jason Smith, who was the Chair of the three member PBI board.

On August 1, 2016 Grievant arrived at work for his shift. C [REDACTED], who was responsible for recording Grievant's work hours on a D.A.R., recorded that Grievant's shift for the day began at 0700 and ended at 1500 hours. (City Ex. 2 at 255)

At 7:32 am Grievant requested a NCIC/PCIC data processing run on a license plate which returned Driver's name and address. Grievant then logged onto the CLEAR data base at 8:35 am and looked up the address he had obtained from the NCIC/PCIC search. CLEAR listed five occupants, including Driver and Passenger.

At 8:41 am, 8:55 am and 10:35 am Grievant contacted Driver on Facebook using the name "Street Justice". The first message to Driver was "Hey", the second was "You still have those Wheels?" and the third was "Hello?" At 11:10 am Driver accepted Grievant's chat and replied "what wheels" There were no further Facebook communications between Grievant and Driver until 2:52 pm.

At 10:22 am Grievant called Passenger at her place of work from his personal cell phone, blocking his number. He had obtained her place of work from Passenger's public Facebook page. Grievant spoke to Passenger but did not identify himself by name or as a

Police officer. Grievant testified that he told Passenger that what the Audi had been doing was unsafe, that “we” know who you are, and “we” reported you to the Police.

Later that morning Grievant texted A■■■■ with Driver’s Facebook page. She texted back that she did not know what the picture was, and Grievant replied it was Driver’s Facebook page. A■■■■ responded that Grievant was a stalker, and Grievant replied with a reference to Passenger not liking the phone call she received. A■■■■ then called Grievant and asked why he would have called Passenger.

Some time between 2:00 pm and 3:30 pm Grievant ended his work shift. It is the City’s position that based on C■■■■’s D.A.R. Grievant’s shift ended at 3:00 pm.

At 2:52 pm Grievant resumed his Facebook conversation with Driver using the Street Justice identifier, stating “Be very careful who you mess with.” The back and forth between Grievant and Driver then continued until 5:13 pm. During the conversation Grievant stated that he saw Driver in his Audi the prior day in Wildwood with Passenger (who Grievant named). Grievant also told Driver “Maybe you’ll get a visit” and that he had a video of Driver he was sending to Driver’s insurance company. A portion of the conversation consisted of back and forth offensive comments unrelated to the incident.

After Passenger received the phone call from Grievant she contacted the Manheim Police Department to report a threatening call. Officer Thomas Miles, with the Manheim Police force, met with Passenger on August 1 to investigate Passenger’s complaint. Driver reported the Facebook conversation with Street Justice later that same day. Passenger provided Miles with the license for A■■■■’s car.

Miles determined that the car belonged to A■■■■ and that she was a Philadelphia Police officer. On August 1 Miles contacted the Department and asked them to have A■■■■ contact him. An officer came to A■■■■’s house on August 1 and told her to contact Miles.

A■■■ called Miles the same day. They spoke briefly, and A■■■ identified Grievant as the Passenger in her car. A■■■ said she would provide Miles' contact information to Grievant. A■■■, who was upset by the Police officer coming to her home, then called Grievant telling him that an officer came to her house to tell her she needed to call Miles. Grievant responded that it was not a big deal and he would take care of it. A■■■ also asked Grievant how he had contacted Driver, and he responded that he had done it from an iPad at home.

On August 2, 2016 Miles received a phone call from Grievant who identified himself as a Police detective, admitted he was the passenger in A■■■'s car, and described the Wildwood altercation. Grievant told Miles he only had the first three elements of the Audi's registration. Miles told Grievant about the August 1 phone call to Passenger and Facebook messages to Driver. Grievant explained to Miles he was at work on August 1 and did not know anything about the call or the Facebook messages. Miles told Grievant he would investigate the number used to call Passenger and would identify the person messaging with Driver under the name "Street Justice".

Miles communicated with Thompson regarding his investigation, and Thompson asked Miles to keep the Department informed and to contact him if he needed assistance. Thompson provided Miles information throughout the investigation.

Thompson also began his own investigation, including interviews with Driver and Passenger. Thompson searched the Department's computer systems to determine when and how Grievant used them, interviewed C■■■ regarding Grievant's work hours on August 1, obtained Grievant's CLEAR Statement of Liability forms, and confirmed Grievant's 911 call on July 31, 2016. Thompson also obtained information from Miles, including call records for Grievant's cell phone that confirmed Grievant's call to Passenger's workplace. Miles also gave Thompson a copy of the Facebook conversation.

Pursuant to Department policy against Internal Affairs interviewing officers who are the subject of a criminal investigation, Thompson refrained from interviewing Grievant and A■■■ while Miles' criminal investigation continued.

During the course of the investigation, on August 11, 2016 Grievant was required to turn in his weapon and was reassigned to the Differential Response Unit. A■■■ was reassigned to Court Attendance.

Miles subsequently informed Thompson that there appeared to be no criminal culpability with respect to A■■■. However, the Manheim District Attorney charged Grievant with a misdemeanor for harassment. As the result of a plea agreement, Grievant pled guilty to a Citation for harassment. On December 15, 2016 Grievant signed a "Non-Traffic Citation" the citation, prepared by Miles, stated:

Def. used his Police resources as a Phila. PD Detective to identify the owner of an Audi after a road rage incident that occurred on the previous evening. Def. then contacted the owner of the Audi's girlfriend [Passenger] anonymously at [Passenger's place of employment] saying he knows where she lives and that she should be careful since he identified her in less than 24 hours. Def. then contacted the owner of the Audi via Facebook [Driver] and threatened to come to his residence. (City Ex. 2 at 16)

When Thompson learned that the Manheim criminal case was closed, he interviewed A■■■ on December 28, 2016 and Grievant on January 9, 2017. At the outset of the interview with Grievant, which was recorded and transcribed, Thompson stated:

You are also reminded, that false statement [sic], lying or attempting to deceive regarding a material fact in response to an official department investigation is punishable by ten days suspension to dismissal under Article I, Section 1-§009-10 of the Disciplinary Code. (City Ex. 2 at 53)

Grievant responded that he understood. During the interview Grievant told Thompson about the Wildwood altercation, the communications with Driver and Passenger and his conversation with Miles. (City Ex. 2 at 53-62) He explained that when he spoke to Miles

he denied the communications with Driver and Passenger because he did not know who he was talking to. Grievant told Thompson that he had looked up the license plate to make sure he had the correct information as he was expecting a call from a State Trooper.

Grievant stated that after he was home he looked for Driver on Facebook. He said that he identified Passenger and where she worked from Driver's Facebook page, and that when he called Passenger the person who answered the call thought Grievant was a "pissed off customer". Thompson asked Grievant:

Q. Besides running the registration on the Audi did you make any other inquiries into any Philadelphia Data bases regarding the incident that occurred on 07/31/2016 or any events that followed?

A. No.

Q. Did you access any other data bases regarding the incidents that occurred on 07/31/2016

A. I don't believe I did.

...

Q. Did you make this phone call [to Passenger] while at work?

A. I don't remember, I just kept replaying what he had done to us.

...

Q. Where were you when you contacted [Passenger] and [Driver]?

A. I am 100 percent sure I was off duty when I contacted [Driver] and I can't say for sure where I was when I contacted [Passenger].

...

Q. Did you use your CLEAR account to obtain information on Driver and Passenger?

A. I don't recall.

(City Ex. 2 at 59-62)

Grievant also told Thompson that he remained anonymous in his communications with Driver and Passenger because he did not want them to be able to contact him. He also stated that despite having signed the Manheim citation, he did not tell Passenger he knew where she lived and had found her in only 24 hours. Thompson's report exonerated

A [REDACTED].²

² In January 2017 Grievant was given back his weapon and reassigned to the Department's South Unit, which he testified was the farthest Unit from his home.

Grievant was charged with three violations of the Disciplinary code. The Section 6-§009-10 violation (Improper or unauthorized use of Departmentally owned or leased equipment) was for using the Department's terminal and CLEAR system to access the Audi's license plate information and Driver's address in violation of the Statement of Liability form. (City Ex. 1)³

The Section 1-§021-10 violation (Conduct Unbecoming) was for using the CLEAR database for no legitimate purpose and for using the information obtained to anonymously harass Driver and Passenger, which resulted in Grievant being criminally charged and pleading guilty to a Summary count of harassment. The charge concludes that Grievant's identity as an officer was now known by Driver and Passenger as well as the Manheim Police Department, and that the events showed a course of conduct with little regard for Grievant's responsibility as a Detective with the Department. (City Ex. 1)

The Section 1-§009-10 violation (lying or attempting to deceive) was for Grievant stating he was "100 percent sure I was off duty when I contacted Driver", not recalling when he contacted Passenger or if he accessed the CLEAR database. In support, the charge states that Grievant contacted A [REDACTED] during the work day and told her what he had done that day, records supported the times Grievant accessed the data bases, and Facebook and cell phone records indicated communications with Driver and Passenger during the work day. The charge states "[i]t is unreasonable to conclude that you would not remember the successive actions that you took during your 7x3 tour of duty on August 1, 2016." (City Ex. 1)

³ Grievant received a formal reprimand for the 6-§009-10 violation. The Union is not challenging that reprimand in this case.

A Police Board of Inquiry (“PBI”) was held regarding the three charges, during which Thompson, A■■■■, Miles, Driver, Passenger, and Grievant testified. All three members of the PBI board found Grievant guilty of the Section 6-§009-10 (Unauthorized Use) violation and recommended a reprimand. Two of the three members found him guilty of the other two charges, recommending a ten day suspension for lying and a thirty day suspension for conduct unbecoming. Grievant received an Official Reprimand for the Unauthorized Use violation. He was given a thirty day suspension for the other two violations.

The Union presented the testimony of Grievant. He repeatedly testified that he did not lie at any point during his interview with Thompson, and that there would be no reason for him to lie as all the facts were known. He stated emphatically that he never lies.

Grievant described his workday when he was in the Recruit Background Investigation Unit, stating that the starting times are not set and officers in his position can start when they want as long as they work an eight hour shift and complete their work. There is no sign in sheet, as the Supervisor records the work time on the D.A.R. Grievant stated that while his normal shift was 7:00 am to 3:00 pm, he generally started between 6:15 am and 6:30 am to avoid the congestion caused by the schools in the area. However, he testified twice that on August 1, 2016 he came to work at “around 7:30” and that he ran the license tag when he came in.⁴

Grievant testified that running the license plate was “a stupid decision”, but he wanted to make sure he had the right information if the State Troopers contacted him

⁴ On cross examination Grievant was asked if his testimony was that on August 1 he worked from approximately 6:00 am to 2:00 pm, and Grievant stated that was his testimony.

about the 911 call he made on July 31 during the altercation. He acknowledged that calling Passenger was also a “stupid decision”. He explained that he made the call on his personal phone and that all he told Passenger was that Driver was unsafe, that Grievant knew who she was and that he reported them to the Police. He acknowledged he did not identify himself on the call but strongly denied he threatened Passenger.

Grievant stated that he sent a Facebook message to Driver but was emphatic that all the Facebook conversations were on his iPad from home after he completed his tour of duty. Grievant acknowledged telling A [REDACTED] during the work day of August 1, 2016 that he knew the identities of the people in the Audi. He also testified that he left work around 2:10 pm to 2:20 pm and arrived home by about 2:30 pm.

Grievant explained that when he spoke to Miles, he walked Miles through the Wildwood altercation, but that he could not remember if Miles asked him about running the license plate. Grievant said it was clear to him that Miles was undertaking a criminal investigation. Grievant asserted that he signed the harassment Citation even though he did not agree with some of the information listed, because he did not want to embarrass the Department and did not feel he was in a position to raise concerns about the wording of the Citation.

Finally, Grievant explained that because of the finding that he violated Section 1-§009-10 (lying or attempting to deceive) his ability to work as a detective on investigations is impaired, as he is not called to testify in court.

DISCUSSION

The City argues there is just cause for the thirty day suspension. It also maintains that the penalty is reasonable because Grievant could have been terminated for

his actions, but the Department considered Grievant's clean disciplinary record and numerous citations when applying the less severe outcome. The City also asserts that under the Collective Bargaining Agreement the Arbitrator does not have the authority to reduce the length of the suspension if there is a finding that Grievant violated the sections of the Discipline Code.

It maintains that there is ample evidence to support a finding that Grievant violated all three sections of the Discipline Code. With respect to the Section 1-§021-10 violation (Conduct Unbecoming) the City maintains Grievant engaged in inappropriate conduct throughout the events leading up to his suspension. It argues that the Section 1-§009-10 violation (lying or attempting to deceive) is supported by the fact that even if Grievant had the Facebook conversation with Driver after work, he initially contacted Driver during work. As a result, the statement Grievant made during his interview with Thompson, that he was certain he did not contact Driver during work hours, is a lie.

The Union argues the City did not have just cause to suspend Grievant. The Union points out that Grievant has a distinguished career as an officer with numerous commendations and no history of discipline. It maintains Grievant's only violation was using the CLEAR data base, as he used his own devices to call Passenger and contact Driver. It also points out that the substantive communications with Driver occurred after Grievant was home and Grievant used his personal devices and never identified himself as a Police officer, making the communications off duty contact not subject to discipline.

The Union asserts that Grievant only pled guilty to a Summary Citation, which is the equivalent to a traffic ticket. It argues that a charge as serious as "conduct unbecoming" requires more than a Citation. It asserts that if a Citation is sufficient to

find “conduct unbecoming” then any Citation could be grounds for a finding of “conduct unbecoming”.

The Union argues strenuously that Grievant did not lie to Thompson. In support it points out that five months passed between the incidents of August 1 and the Thompson interview , and that Grievant answered Thompson’s questions to the best of his ability. The Union maintains Grievant had no reason to lie during the investigation as the facts he is accused of lying about were already established in the investigation.

Finally, the Union argues that given Grievant’s outstanding record, that his only substantive on duty violation was using the CLEAR system, and that he did not lie to Thompson, a thirty day suspension is inappropriate in this case. The Union maintains that this Arbitrator has the authority to reduce the thirty day suspension.

The City bears the burden of proof in this case.

Turning first to the Section 1-§0021-10 charge of Conduct Unbecoming, the central facts are not in dispute. It is undisputed that when Grievant arrived at work on August 1, 2016 he improperly used the Department’s systems to identify the name and address of Driver and Passenger. Grievant used that information during his shift to quickly track down Driver and Passenger’s Facebook pages. It is also undisputed that during his shift Grievant anonymously called Passenger at her place of business, and that at 8:41 am, 8:55 am and 10:35 am Grievant contacted Driver on Facebook using the name “Street Justice”. These actions (as well as Grievant’s subsequent Facebook messages to Driver) resulted in Grievant being charged with misdemeanor harassment and ultimately pleading guilty to a Summary Citation for harassment. Taken together these actions do not meet the

standards of “Honor”, “Service” and “Integrity” by which Philadelphia Police officer are expected to conduct themselves.

While it is also undisputed that all Grievant’s communications with Driver and Passenger were on his personal devices, the fact remains that all the communications arose from the misuse of the Department’s systems. Grievant was on notice that he could only use the CLEAR system for official Police business, having signed numerous versions of the Waiver of Liability form. Moreover, the phone call to Passenger and initial communications with Driver were during Grievant’s tour of duty. In that context, the fact that Grievant used his personal devices is not a compelling argument that his actions were not on duty conduct. Similarly, the fact that Grievant did not identify himself as an officer when harassing Driver and Passenger does not ameliorate his harassment or convert it from on duty conduct to off duty conduct.

Grievant maintains that he did not threaten Passenger, and that his back and forth with Driver on Facebook was just guys “bantering”. However, even if Grievant did not think he was threatening, both communications were objectively threatening given Grievant’s anonymity and ability to track down and contact both Driver and Passenger in less than 24 hours. Passenger certainly felt threatened by Grievant’s anonymous call as she immediately contacted the Manheim Police. And while portions of the Facebook post might generously be described as “two guys engaged in banter”, Grievant anonymously told Driver to “Be very careful who you mess with” and “Maybe you’ll get a visit”. Those statements, particularly when made anonymously, are certainly threatening.

Finally, even if the Facebook exchanges that occurred beginning at 2:52 pm were made when Grievant was off duty, the conversations were a continuation of Grievant’s

actions during his work shift. Under those circumstances Grievant cannot argue that the conversations were off duty conduct unconnected to his position as a Police officer.⁵

Based on the foregoing there was just cause for the Department to conclude that Grievant violated 1-§021-10 of the Code of Discipline.

Turning to the 1-§009-10 charge of lying or attempting to deceive. It is clear Grievant made inaccurate statements in his interview with Thompson. Thompson asked Grievant three questions regarding his use of department data bases:

Q. Besides running the registration on the Audi did you make any other inquiries into any Philadelphia Data bases regarding the incident that occurred on 07/31/2016 or any events that followed?

A. No.

Q. Did you access any other data bases regarding the incidents that occurred on 07/31/2016

A. I don't believe I did.

...

Q. Did you use your CLEAR account to obtain information on Driver and Passenger?

A. I don't recall.

It is undisputed that Grievant did access the CLEAR data base. Accordingly, Grievant's responses to the first two questions were inaccurate on their face.

Thompson also asked Grievant:

Q. Where were you when you contacted [Passenger] and [Driver]?

A. I am 100 percent sure I was off duty when I contacted [Driver] and I can't say for sure where I was when I contacted [Passenger].

While there is conflicting testimony on when Grievant started and ended his shift,⁶ it is undisputed that Grievant was working when he sent Driver the Facebook messages at

⁵ The fact that Grievant resolved the Manheim misdemeanor charge by agreeing to plead guilty to a Citation does not lessen the inappropriateness of Grievant's underlying conduct. It is that conduct, not the fact that he received a Citation, that forms the basis for this Arbitrator's conclusion that Grievant violated 1-§021-10 of the Code of Discipline.

⁶ The City did not present C█████ to testify regarding the D.A.R. report that listed Grievant's work day as 0700 to 1500. Grievant provided conflicting testimony on his August 1, 2016 working hours. He testified that on August 1 he started his shift at 7:30 am and on cross that he started the shift at 6:00 am. Based on the range of start times, working an

8:41am, 8:55am and 10:35am. Grievant's statement that he was off duty when he contacted Driver was not accurate.

However, a finding that Grievant lied or attempted to deceive requires more than a showing that Grievant made factual misstatements, it requires a showing that Grievant knowingly or intentionally made those misstatements. Intent can be concluded in a variety of ways, including a determination that a reasonable person could not have misstated or mis-remembered the facts at issue.

On August 1, 2016 Grievant engaged in a series of actions that culminated in his contacts with Driver and Passenger. The first steps in that series required Grievant to use the Police data bases to identify Driver and Passenger. Those searches gave Grievant the information he needed to contact Driver and Passenger. For Grievant to forget that he accessed the CLEAR database means he forgot how he determined the identities of Driver and Passenger. The steps Grievant took to identify them were systematic and thoughtful. It is not reasonable to conclude Grievant forgot he used the CLEAR system, which was one of the systematic steps he took to identify Driver and Passenger.

There is insufficient evidence to conclude that Grievant's substantive communications with Driver occurred while he was on duty. However, Grievant's initial communications with Driver all occurred during the August 1 work day. Grievant was focused on connecting with Driver on the morning of August 1, as evidenced by Grievant messaging Driver three times that morning on Facebook. It is undisputed that his conversation with Passenger also occurred during the work day. Grievant's text to A [REDACTED]

eight hour shift put the end of Grievant's workday at between 2:00 pm and 3:30 pm. He also testified that he left work around 2:10 pm to 2:20 pm and arrived home by about 2:30 pm. Based on the foregoing, there is not sufficient evidence to conclude that Grievant was still at work when he re-engaged Driver on Facebook at 2:52 pm.

during the work day illustrates he was excited that he had found Driver's Facebook page and had called Passenger. It is not reasonable to conclude that Grievant did not remember he initially contacted Driver and called Passenger during the work day.

While the January 9, 2017 interview occurred a little over five months after the events at issue, Grievant had ample reason to remember the events of August 1 during the intervening five months. He was the subject of the Manheim criminal investigation and the Department's Internal Affairs investigation. The questions Thompson asked were not regarding relatively inconsequential events that had occurred five months earlier. The questions were about events Grievant had been forced to focus on for five months. It is not reasonable to conclude that the five month gap would cause Grievant to forget or misremember the critical events of August 1.

The Union's argument, that Grievant had no reason to lie as all the facts were already known to Thompson at the time of the interview, is not persuasive. While Thompson had the facts regarding Grievant's use of the Department's systems and the times Grievant contacted Driver and Passenger, the record does not support a finding that Grievant knew Thompson had that information at the time he interviewed Grievant.

Based on the foregoing there was just cause for the Department to conclude that Grievant violated 1-§009-10 of the Code of Discipline.

Grievant, an officer with an otherwise clean disciplinary record and numerous commendations, lost his good sense during his August 1, 2016 shift by using the Department's data bases to identify and harass Passenger and to identify and contact Driver and later harass him. Grievant compounded that improper conduct by failing to candidly answer Thompson's questions during the January 9, 2017 interview. While Grievant's prior record is unblemished, his actions and failings On August 1 and on

January 9 were serious and damaged both his own reputation as well as the Department's reputation.

Based on the foregoing discussion and findings, the City had just cause to suspend Grievant for thirty days for violating sections 1-§009-10 and 1-§021-10 of the Code of Discipline.

Consistent with the foregoing discussion and findings, the Arbitrator renders the following:

AWARD

The Grievance is denied. The City had just cause to suspend Grievant for thirty days.

Robert H. Barron

Robert H. Barron, Esq.

Arbitrator
October 9, 2018